

United States v. Garcia-Rico, No. 04-50137

JAN 20 2006

PAEZ, Circuit Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent from the majority's conclusion that the district court did not abuse its discretion in denying Garcia-Rico's motion to withdraw his guilty plea. "A defendant may withdraw a guilty plea after its acceptance but before sentencing if the defendant shows a fair and just reason for requesting the withdrawal." *United States v. Garcia*, 401 F.3d 1008, 1011 (9th Cir. 2005) (internal quotation omitted). We apply this standard liberally. *Id.* We recently held that an attorney's mischaracterization of, and a defendant's subsequent misunderstanding about, the sentence the defendant was likely to receive is sufficient to satisfy the "fair and just reason" standard. *United States v. Davis*, 428 F.3d 802, 805-808 (9th Cir. 2005).

"A district court abuses its discretion when it makes an error of law." *United States v. Ortega-Ascanio*, 376 F.3d 879, 883 (9th Cir. 2004). The district court in Garcia-Rico's case did not have the benefit of our recent decision in *Davis*. It is unclear from the district judge's comments on what grounds he denied Garcia-Rico's motion to withdraw his guilty plea. Garcia-Rico presented evidence that his attorney misinformed him about his likely sentence. The district court never made a finding that this evidence was not credible. Because *Davis* bears directly on

Garcia-Rico's claim for relief, and because nothing in the record indicates that the district court applied the reasoning of *Davis* in denying Garcia-Rico's motion, I would remand this case to the district court for reconsideration of Garcia-Rico's motion to withdraw his guilty plea in light of *Davis*.